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TERRY AND FOURTH AMENDMENT FIRST PRINCIPLES

AKHIL REED AMAR*

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .

INTRODUCTION: A TALE OF TWO *TERRYS*

Thirty years after the Supreme Court's landmark decision in *Terry v. Ohio*¹ and almost seven-times-thirty years after the adoption of the Fourth Amendment, many lawyers, scholars, and judges still fail to grasp the basic insights of the case and the first principles of the Amendment. Chief Justice Warren's opinion for the Court in *Terry* must bear some of the blame for the current confusion. Even as the great Chief of the great Court pointed forward to a more sensible understanding of the Amendment, he gestured backward to contradictory language from earlier cases. Such is the unsteady path of common law evolution, of course, but three decades of confusion are enough. To the extent that there were in effect two inconsistent *Terry* opinions, we must choose which *Terry* to follow. I urge that we follow what I shall call the good *Terry*, not simply because it was more sensible and more truly progressive, but also because that opinion within the opinion was more consistent with constitutional text, history, and structure. Moreover, in the three decades since the case was decided, much of the Court's case law has built on the foundation of the good *Terry*. Thus, three decades after *Terry* and two centuries after the Fourth Amendment, we can, if we are wise, affirm insights that are not only forward-looking in the best sense (workable and progressive) but also backward-looking in an attractive sense (faithful to original intent and consistent with a good deal of precedent). In short, *Terry* can help us grasp Fourth Amendment first principles, and

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¹ 392 U.S. 1 (1968).

these principles, in turn, can help us grasp *Terry*, and aid us in deciding which *Terry* to follow today.

In a nutshell, the good *Terry* that I mean to affirm today had several basic features. First, it embraced a broad definition of "searches" and "seizures," enabling the Fourth Amendment to apply to myriad ways in which government might intrude upon citizens' persons, houses, papers, and effects. Second, the good *Terry* did not insist that all such broadly defined searches and seizures be preceded by warrants. Third, and more dramatic still, the good *Terry* did not insist that all warrantless intrusions be justified by probable cause. The stunning logical lesson of the good *Terry* is thus that a warrantless search or seizure may sometimes lawfully occur in a situation where a warrant could not issue (because probable cause is lacking). Fourth, in place of the misguided notions that every search or seizure always requires a warrant, and always requires probable cause, the good *Terry* insisted that the Fourth Amendment means what it says and says what it means: All searches and seizures must be reasonable. Reasonableness—not the warrant, not probable cause—thus emerged as the central Fourth Amendment mandate and touchstone. Fifth, the good *Terry* identified some of the basic components of Fourth Amendment reasonableness so that the concept would make common sense and constitutional sense. Reasonable intrusions must be *proportionate* to legitimate governmental purposes—more intrusive government action requires more justification. Reasonableness must focus not only on privacy and secrecy but also on *bodily integrity* and *personal dignity*: Cops act unreasonably not just when they paw through my pockets without good reason, but also when they beat me up for fun or toy with me for sport. Reasonableness also implicates *race*—a complete Fourth Amendment analysis, the good *Terry* insisted, must be sensitive to the possibility of racial oppression and harassment. If we wrongly think that the basic Fourth Amendment mandates are warrants and probable cause, we will have difficulty explicitly factoring race into the equation, but the spacious concept of reasonableness allows us to look race square in the eye, constitutionally. Concerns about discrimination should also remind us of the desirability, where possible, of cabining the *discretion* of cops and other government officials. This desideratum must thus factor into a proper analysis of constitutional reasonableness, the good *Terry* suggested. Reason-

ableness analysis should also be suitably *responsive to popular sentiment*. The views of ordinary citizens—especially citizens specially intruded upon—are highly relevant to the reasonableness balance (though not always dispositive). Finally, on the issue of Fourth Amendment remedies, the good *Terry* candidly conceded some of the problems of the exclusionary rule—the costs it imposes on victims of crime, the frustration of efforts to prevent crime, the analytic misfit of the rule when cops seek goals other than convictions, the irrelevance of the rule when the innocent are abused and no evidence is found, and the futility of the rule in dealing with the problem of police brutality. In response, the good *Terry* cautioned against “a rigid and unthinking application of the . . . rule”² and called for the development and use of “other remedies than the exclusionary rule to curtail abuses for which that sanction may prove inappropriate.”³

The bad *Terry* that I mean to disavow today tended to undercut all this. It failed to define “search” and “seizure” broadly enough: Sustained and purposeful surveillance by the unaided eye, the bad *Terry* implied, is not a Fourth Amendment “search” and thus, apparently, need not be reasonable. The bad *Terry* refused to retreat from earlier cases suggesting that warrants are required “whenever practicable” and that in most situations only “exigent circumstances” will excuse the lack of a warrant. The bad *Terry* offered no explanation—none whatsoever—why cops may sometimes search and seize without a warrant even in a situation where no probable cause exists and thus no warrant could lawfully be issued by a magistrate. (The answer to this puzzle—that the Framers thought that searches without warrants were sometimes *less* dangerous than searches with warrants—is one that would no doubt be news to the bad *Terry*. Of course this answer also undercuts the bad *Terry*’s idea that only “exigent” circumstances can excuse a lack of a warrant: Temporal exigency can explain why cops need not get a warrant where there simply is not time to get one, but cannot explain why cops can search without probable cause, where even a judge with all the time in the world would be obliged to deny a warrant.) The bad *Terry* hinted at some of the factors that bear on reasonableness, but failed to develop a systematic account of these factors, needlessly leading civil libertarians to worry that under a proper

² *Id.* at 15.

³ *Id.*

reasonableness regime, government would have free rein. And to the extent the bad *Terry* could be read to imply that under a proper reasonableness analysis, searching in the absence of individualized suspicion is always unconstitutional—that there must always be “specific” facts pointing to specific targets—the bad *Terry* offered civil libertarians false hope, and made a promise that the Court cannot keep if it means to be faithful to text, history, and common sense. Finally, the bad *Terry*, while acknowledging the flaws of the exclusionary rule, nevertheless pledged allegiance to it, and recycled silly arguments that the rule is somehow mandated by the Constitution and by sound legal principles.

I. WHAT SHOULD COUNT AS “SEARCHES AND SEIZURES”?

The *Terry* Court began its substantive analysis, in section I of its opinion, by quoting the language of the Fourth Amendment as follows: “[T]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”⁴ Later, I shall focus on the remarkable ellipses in *Terry*’s quotation, which omitted altogether the remaining Fourth Amendment language concerning warrants and probable cause. But for now, I want to direct our attention to a more mundane point: The Fourth Amendment comes into play only when “searches” or “seizures” take place. How broadly should these threshold terms be read?

The good *Terry* suggested that these terms should be generously construed. In response to the argument that Officer McFadden’s frisking of Mr. Terry’s outer garments fell short of a full-blown arrest, and thus lay “outside the purview of the Fourth Amendment,”⁵ the good *Terry* was rightly indignant:

We emphatically reject this notion. It is quite plain that the Fourth Amendment governs “seizures” of the person which do not eventuate in a trip to the station house and prosecution for crime—“arrests” in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has “seized” that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person’s

⁴ *Id.* at 8 (quoting U.S. CONST. amend. IV).

⁵ *Id.* at 16.

clothing all over his or her body in an attempt to find weapons is not a "search." Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.⁶

Why, we might ask, did anyone ever make the "torture[d]"⁷ suggestion that stops and frisks somehow lay "outside the purview of the Fourth Amendment"?⁸ The answer is that some folks believed that if we called these things by their true names—"searches" and "seizures"—they would be unconstitutional unless accompanied by warrants and probable cause. Since it would not be sensible to require that all stops and frisks be so accompanied, these folks reasoned backwards and opened with the gambit that these intrusions were simply not "searches and seizures." But had this "nonsearch" gambit succeeded, the result would have been that stops and frisks would have been wholly unregulated by the Fourth Amendment. The good *Terry* properly and "emphatically" declined the "nonsearch" gambit, but this emphatic move was made possible precisely because of the good *Terry*'s insistence that the basic Fourth Amendment mandate was not the warrant, not probable cause, but reasonableness. In other words, the more wooden and inflexible the requirements of the Fourth Amendment, the higher the likely threshold of "searches and seizures." If all "searches" and "seizures" require warrants and/or probable cause, judges will strain to deny that metal detectors and luggage x-rays at airports, border-crossing checkpoints, and countless other intrusions less than arrests and full-blown rummagings are truly "searches" and "seizures." Conversely, if the Fourth Amendment does not invariably and inflexibly require probable cause and warrants, then judges will be willing to honestly identify more minor intrusions as "searches" and "seizures" triggering the Amendment. Thus, the good *Terry* explicitly linked its generous understanding of "searches and seizures" to its embrace of reasonableness:

[The nonsearch gambit] seeks to isolate from constitu-

⁶ *Id.* at 16-17 (footnotes omitted).

⁷ *Id.* at 16.

⁸ *Id.*

tional scrutiny the initial stages of the contact between [sic] the policeman and the citizen. And by suggesting a rigid all-or-nothing model of justification and regulation under the Amendment, it obscures the utility of limitations upon the scope, as well as the initiation, of police action as a means of constitutional regulation. This Court has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and [its] scope. . . . [The nonsearch gambit] serve[s] to divert attention from the central inquiry under the Fourth Amendment—the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.⁹

Yet what the good *Terry* explicitly gave, the bad *Terry* implicitly took away. The Court identified its "first task" as establishing "at what point" on the facts of the case "the Fourth Amendment [became] relevant."¹⁰ The good *Terry* made clear that when Officer McFadden "initiat[ed] . . . physical contact"¹¹ with the citizen, the Amendment came into play, but the bad *Terry* implied that until that point of contact, the Amendment had nothing to say. Recall that before initiating contact, Officer McFadden had purposefully surveilled the citizen for about ten to twelve uninterrupted minutes. Why wasn't this sustained and purposeful surveillance a "search" if we seek a broad definition of Fourth Amendment protections? Ordinary language surely would permit, even if it does not demand, this generous definition. The *Oxford English Dictionary*, for example, includes the following as one of its definitions of the verb "search": "[t]o look scrutinizingly at."¹² The *Oxford English Dictionary* goes on to include as an example a phrase from Justice Holmes's father (small world, isn't it?): "He searched her features through and through."¹³ On this view, wasn't Officer McFadden "searching" Mr. Terry's features through and through when the officer took up his observation post to "look scrutinizingly at" Mr. Terry?

Of course, to call McFadden's initial surveillance a search is not to say it was an *unconstitutional* search. To be sure, McFadden's initial gazing was without a warrant, and without probable

⁹ *Id.* at 17-19 (footnote omitted).

¹⁰ *Id.* at 16.

¹¹ *Id.* at 19 n.16.

¹² 14 THE OXFORD ENGLISH DICTIONARY 806 (2d ed. 1989).

¹³ *Id.*

cause, but as we have seen, the good *Terry* insisted that “the central inquiry under the Fourth Amendment” is not the warrant, not probable cause, but “reasonableness in all the circumstances.”¹⁴ And there are obvious circumstances that render McFadden’s initial surveillance reasonable, such as: Its relatively short length, its observation of citizens on the public streets (where one does assume a certain risk of being seen by strangers), its relatively unobtrusive and nonhumiliating character, its absence of high-tech video or audio magnification devices, and its bona fide purpose (to ferret out street crime rather than, say, to harass opposition politicians). But if we change some of these circumstances, at some point surveillance could violate the Fourth Amendment—if, say, McFadden stalked a citizen for weeks on end, or used fancy remote microphones to eavesdrop on her every word (even mutterings under her breath), or stood just outside her first-floor apartment and peeped through the blinds into her bedroom. (Assume that in each case, McFadden could point to no reason whatsoever for the surveillance, but simply insisted that because these intrusions were not Fourth Amendment “searches,” no good reason was needed.) Of course, one might say that these hypotheticals merely show that at some point a surveillance “nonsearch” becomes a “search,” but it seems more sensible to say that at some point a “reasonable” surveillance search becomes “unreasonable.” It would be an exaggeration (though a nicely alliterative one) to say that the “non-search” approach was “non-sense,” but surely the “non-search” approach is precisely an “all-or-nothing model” that “isolate[s] from constitutional scrutiny the initial stages of [interaction] between the policeman and the citizen”¹⁵—the very model, that is, that the good *Terry* explicitly urged us to reject.

Why then, didn’t the bad *Terry* follow the logic of the good *Terry* by calling surveillance itself a “search” and then focusing on its “intensity” and “scope” when measured against the standard of reasonableness? Perhaps because such a recognition would have forced the Court to make clear that some searches might be reasonable even in the absence of individualized suspicion. Recall that, at the very beginning of his visual interaction with Mr. Terry, Officer McFadden had, at most, a subjective hunch, a feeling, rather than some measurable quantum of ob-

¹⁴ *Terry*, 392 U.S. at 19.

¹⁵ *Id.* at 17.

jective, individualized suspicion based on specific facts: "He had never seen the two men before, and he was unable to say precisely what first drew his eye to them."¹⁶ The good *Terry* was clear that searches need not always be accompanied by probable cause, but the bad *Terry* was somewhat unclear about whether searches unaccompanied by any individualized suspicion are ever permissible. In at least one passage, *Terry* could be read to say that only "specific" facts implicating specific persons could justify searches, and that "subjective" and "inarticulate hunches" could never suffice.¹⁷

The bad *Terry*'s obvious problem here is that if, as the good *Terry* admitted, the Fourth Amendment's words and common sense do not invariably require warrants and probable cause, neither do they invariably require individualized suspicion (a phrase, of course, that nowhere appears in the Amendment itself). Metal detectors at airports and in courtrooms, for example, are constitutionally reasonable when we consider all the circumstances—they are relatively unintrusive and nonhumiliating, justified by legitimate safety concerns, and used in ways that treat all citizens alike. If we insist that reasonable searches must always have a certain quantum of individualized suspicion, we will simply recreate, at a different level, the same "all-or-nothing" approach that will generate hydraulic pressure to define certain searches as nonsearches, and thus wrongly isolate them from proper reasonableness review of their intensity, scope, justification, evenhandedness, and so on. To the extent the bad *Terry* dicta of "specificity" could be read to demand individualized suspicion, it undermined precisely what was right about the good *Terry*.

An invariable requirement of individualized suspicion not only lacks textual roots, and offends common sense, but also flies in the face of constitutional history. The First Congress, which drafted the Fourth Amendment, passed at least two statutes that provided for searches and seizures in the absence of individualized suspicion. The first statute authorized federal customs officers to board and search—without warrants, without probable cause, and without individualized suspicion—all ships within four leagues of the coast;¹⁸ and the second statute

¹⁶ *Id.* at 5.

¹⁷ *Id.* at 21-22.

¹⁸ Act of Aug. 4, 1790, ch. 35, §§ 31, 64, 1 Stat. 145, 164, 175 (repealed 1799).

authorized warrantless and suspicionless entry into and inspection of all "houses, store-houses, ware-houses, buildings and places"¹⁹ that had been registered (as required by law) as liquor storerooms or distilleries. If anyone in the First Congress deemed these statutes unconstitutional, modern scholars have yet to find him. At least one modern scholar has tried to explain away some of this history by saying that "ships" were not "effects" within the meaning of the Fourth Amendment.²⁰ But this is precisely the "nonsearch" gambit that the good *Terry* rightly rejected. If ships are not protected by the Amendment, what about cars? What about phone conversations? What about anything other than persons, houses, and papers? Taken seriously, this gambit threatens to place much of the world beyond "the purview of the Fourth Amendment."²¹ It takes the broad word "effects"—designed as an inclusive catchall sweeping all important stuff into the Fourth Amendment—and turns it upside down and inside out. And as an effort to explain away certain historical cases as situations where the Fourth Amendment did not apply, it fails miserably. Surely the persons on ships were "persons" yet they too were detained—seized, temporarily—under the ship statute. Surely the "houses, store-houses, [and] ware-houses"²² regulated by the distillery statute were "houses" of sorts—though obviously deserving of less privacy than a purely private abode. To move from history to the present day, surely persons who pass through metal detectors at airports and through border checkpoints are Fourth Amendment "persons" (and their bags x-rayed at airports are Fourth Amendment "effects") but this should not trigger an inflexible rule of warrants or probable cause, or even individualized suspicion. Here, the non-search gambit is, quite simply, non-sense.

This Act is discussed in *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 (1983) (upholding boarding and inspection, without warrant and without suspicion of wrongdoing, of ships in U.S. waters with access to high seas).

¹⁹ Act of Mar. 3, 1791, ch. 15, § 29, 1 Stat. 199, 206 (1791).

²⁰ I refer here to Thomas Y. Davies. For more discussion, see Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 68-69 (1996).

²¹ *Terry*, 392 U.S. at 16.

²² § 29, 1 Stat. at 206.

II. ARE WARRANTS AND PROBABLE CAUSE REQUIRED FOR ALL SEARCHES AND SEIZURES?

Assuming that government has triggered the Fourth Amendment by engaging in a "search" or "seizure," the obvious next question is what the Fourth Amendment requires. The good *Terry* seemed emphatic in its insistence that "the central inquiry under the Fourth Amendment" is "reasonableness in all the circumstances."²³ Indeed, we have already noted that when it quoted the words of the Fourth Amendment, the *Terry* Court simply ended the quotation after the reasonableness clause, reducing the remainder of the Amendment—which speaks of warrants and probable cause—to an ellipsis.²⁴ For many lawyers, scholars, and judges today, this elliptical quotation is nothing less than scandalous. For they assume that the reasonableness clause cannot be understood in isolation—it gains its true meaning only when read alongside the warrant clause. Concretely, these "warrantists" assume that the two clauses are linked by an implicit idea that all searches and seizures without warrants are unreasonable (at least presumptively).

But there are several problems with this "warrantist" reading of the Amendment. First, it is not what the words of the Amendment say. Second, no Framers ever said that this is what the Amendment did or should mean. Third, no early treatise said that all warrantless searches and seizures were (even presumptively) illegitimate. Fourth, many early state constitutions featured search and seizure provisions, yet none of these said that all searches and seizures required (even presumptively) warrants. Fifth, several early state cases construing these state constitutional counterparts explicitly rejected the notion of a general warrant requirement, and no early state case—or federal case, for that matter—embraced the idea. Sixth, a large number of historical examples give the lie to the idea that warrants were always required at the Founding—warrantless arrests, searches incident to warrantless arrest, searches of ships, searches of liquor store-houses, border searches, successful seizures of contraband and stolen goods, and on and on. Seventh, if the warrant requirement is merely presumptive, it is far from clear how and why the presumption is to be rebutted. To infer a (presumptive)

²³ *Terry*, 392 U.S. at 19.

²⁴ *See id.* at 8.

warrant requirement and then to infer a set of exceptions to that (presumptive) requirement is to do an awful lot of inferring and very little reading: In effect, it is to rewrite the Amendment rather than to read it as written (and intended). Eighth, without a fairly elaborate set of exceptions to a (presumptive) warrant requirement, the Amendment would simply defy common sense: In the real world there are a vast number of intrusions ill-suited for warrants. This is especially evident if searches and seizures are defined broadly, consistently with the good *Terry*. Many of these intrusions—such as metal detectors at airports, border-crossing checkpoints, and plain-view limited public surveillance à la Officer McFadden—are reasonable even though they lack probable cause or even individualized suspicion, and thus no warrant could ever authorize them. Ninth, in the three decades since *Terry*, and especially in the last few years, the Supreme Court has often (though not always) read the Amendment in keeping with the good *Terry*, emphasizing reasonableness, rather than warrants and probable cause as the Amendment's central mandate. Tenth, the emphasis on warrants as the central Fourth Amendment safeguard ignores the ways in which these ex parte instruments, which issue without notice or opportunity to be heard and which exert preclusive force in later proceedings, actually pose distinct threats to liberty that certain warrantless searches do not.

These are not the only problems, but ten is a nice round number, and life is short. Elsewhere, I have tried to elaborate these and other problems of the so-called warrant requirement, and I shall not try to rehash all this here.²⁵ But before I return to *Terry*, perhaps it might be helpful to briefly survey some of the recent scholarly efforts to revive the warrant requirement, and to say why none of these efforts moves me in the slightest.

A. *An Interlude*

My friend Professor Morgan Cloud has suggested that history is often indeterminate, and can be read in different ways.²⁶

²⁵ See generally Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994); Amar, *supra* note 20. The Harvard article is reprinted, with modest revisions, in AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997) [hereinafter *CRIMINAL PROCEDURE*]. Still more material appears in AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

²⁶ See Morgan Cloud, *Searching Through History; Searching for History*, 63 U.

True enough, but this does not change the fact that the Fourth Amendment text does not require warrants; and Professor Cloud cannot point to any specific founding-era historical source—Framer, pamphlet, treatise, state constitution, case, etc.—that says something like the following: “[A]ll searches and seizures require warrants (at least presumptively).” Where’s the beef? If history is often as fuzzy and cloudy as the good professor suggests, his lack of specific evidence seems all the more striking. For even if we did ever find a few stray statements supporting the warrant requirement, we would have to weigh these against the great weight of contrary textual, historical, structural and practical evidence.

Consider next the views of Professor Thomas Y. Davies, who has railed against the idea, forcefully evident in *Terry*’s elliptical quotation of the Fourth Amendment, that reasonableness can be understood as a “free-standing” requirement rather than as a shorthand for a warrant.²⁷ Davies’s apparent argument is that the grammar of the Amendment implies that all warrantless searches and seizures are ipso facto “unreasonable” (at least presumptively). But as I have shown elsewhere, major prototypes of the Fourth Amendment stressed freestanding reasonableness as the central inquiry. Richard Henry Lee put forth the following proposal, which I quote in its entirety without ellipsis: “That the Citizens shall not be exposed to unreasonable searches, seizures of their papers, houses, persons, or property.”²⁸ And here is an early proposal from the prominent Anti-Federalist, the Federal Farmer: “[A man should be] subject to no unreasonable searches or seizures of his person, papers or effects.”²⁹ A similar free-standing reasonableness proposal surfaced in the Massachusetts ratifying convention, protecting the people against “unreasonable searches and seizures of their persons, papers, or possessions.”³⁰ (Note also how all these proposals use broad residual language—“property,” “effects,” and “possessions”—to *sweep in* all impor-

CHI. L. REV. 1707 (1996).

²⁷ Davies’s views appear in testimony before a Senate committee, and are discussed in Amar, *supra* note 20.

²⁸ 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 238-39 (John P. Kaminski & Gaspare J. Saladino eds., 1981) (Lee’s proposed amendments, September 27, 1787).

²⁹ Letters from the Federal Farmer VI (1787) in 5 COMMENTARIES ON THE CONSTITUTION at 274 (John P. Kaminski & Gaspare J. Saladino eds., 1995).

³⁰ DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS HELD IN THE YEAR 1788, at 86-87 (Boston, William White, 1856).

tant stuff, not to *keep out* ships, etc.)

Of course, in our Fourth Amendment, the reasonableness clause, though grammatically freestanding, is appended (via a comma) to a second clause that addresses warrants. Isn't it evident that the implicit logical linkage between these two clauses is that all warrantless searches are therefore unreasonable? No. As I have explained elsewhere, the logical linkage is precisely the reverse: Warrants lacking in probable cause (and the other requisites specified in the second clause) are therefore unreasonable within the meaning of the first clause. If we seek to logically link the two clauses of the Fourth Amendment, *it is the overbroad warrant, not the warrantless search, that is ipso facto unreasonable*. This reading fits precisely the words of the Amendment. It also tracks perfectly the earlier language of the celebrated Article XIV of the Massachusetts Constitution of 1780 and its 1784 New Hampshire Constitution look-alike.³¹ Each of these documents laid down a grammatically freestanding reasonableness requirement in a stand-alone sentence. Each then appended a second sentence limiting warrants, a sentence in which overbroad warrants are explicitly identified as "contrary to this right"—that is, contrary to the right against unreasonable searches and seizures. It is clear, then, that what is unreason-

³¹ The similarity between the two articles is striking. Article Fourteen of the Massachusetts Constitution provided:

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

MASS. CONST. of 1780, art. XIV.

Article Nineteen of the New Hampshire Constitution provided:

Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath, or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

N.H. CONST. of 1784, art. XIX, *reprinted in* 6 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 346 (William F. Swindler ed., 1976).

able in these documents is the overbroad warrant, not the warrantless search. During the debate over the ratification of the Federal Constitution, the influential Federal Farmer echoed these documents:

[T]hat all persons shall have a right to be secure from all unreasonable searches and seizures of their persons, houses, papers, or possessions; and that all warrants shall be deemed contrary to this right, if the foundation of them be not previously supported by oath, and there be not in them a special designation of persons or objects of search, arrest, or seizure.³²

In all three state ratifying conventions that put forth prototypes of the Fourth Amendment, the overbroad warrant, not the warrantless search, is condemned as unreasonable, as is evident from their use of the word "therefore."³³ And in early drafts of the Amendment in the First Congress, all this is confirmed and taken one step further—indeed, a step too far. When these drafts proclaimed that the right against unreasonable searches and seizures "shall not be violated by"³⁴ overbroad warrants, overbroad warrants were surely condemned as unreasonable; but, alas, they were the *only* unreasonable intrusions condemned. As finally written, the grammatically free-standing reasonableness clause applies not merely to condemn the overbroad warrant, but also to regulate all searches and seizures, even warrantless ones. And this grammatically free-standing clause regulates them not by invariably requiring warrants, but by demanding reasonableness. To the extent that the good *Terry* helps us see all this—by quoting the grammatically free-standing language as free-standing, by highlighting reasonableness as the "central inquiry under the Fourth Amendment,"³⁵ and by stressing the regulatory role of this ideal even in warrantless situations—the good *Terry* is very good indeed.

³² Letters from The Federal Farmer XVI (1788), in 2 THE COMPLETE ANTI-FEDERALIST at 328 (Herbert J. Storing & Murray Dry eds., 1981).

³³ 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 658 (Jonathan Elliot ed., 1888) (Virginia) ("That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers, and property; all warrants, therefore, [lacking certain safeguards] are grievous and oppressive . . . [and] dangerous . . ."); *id.* at 328, 335 (New York and North Carolina) (similar).

³⁴ 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 436 (Joseph Gales ed., 1834).

³⁵ *Terry v. Ohio*, 392 U.S. 1, 19 (1968).

But if overbroad warrants are so bad—*ipso facto* unreasonable—why are warrantless intrusions ever any better? If a warrant lacking probable cause is plainly unreasonable and unconstitutional, why would a warrantless search or seizure equally lacking probable cause ever be any more constitutionally acceptable? So asks my friend Professor Tracey Maclin in work that attempts to rebut my own. Like Professors Cloud and Davies, Professor Maclin seeks to quarrel with my historical account, but like the others, he is unable to produce even a single early statement to the effect that “warrants are always required” or that “warrants are presumptively required.” Not one! And in a 72-page article! But even if we lack specific historical support for a warrant requirement and a probable cause requirement, he suggests, surely we should take seriously the larger principles at work. If the Framers despised general—that is, overbroad—warrants, why wouldn’t they, if they thought about it carefully, have likewise despised “*warrantless* searches exhibiting *the same characteristics* that marked general warrants?”³⁶

The one-paragraph answer, which I have elsewhere elaborated and documented in many paragraphs, is that warrantless searches, by definition, never exhibited *the same characteristics*: Warrants, by definition, conferred certain immunities on government searches and seizures that did not come into play when these intrusions occurred without a warrant. A warrant typically issued without notice and opportunity to be heard, and immunized the bearer of the warrant from the tort suit that the citizen target of the search would otherwise have been free to bring. If officers searched with a valid warrant, they could not be sued for simply carrying out that warrant within its terms; however, if they lacked a warrant and nonetheless decided to search or seize, they risked a trespass lawsuit, in which a civil jury would typically decide whether their search or seizure was reasonable. And so any given search or seizure, if conducted pursuant to a warrant, was to that extent more dangerous and troubling—because immune from after-the-fact review and oversight in tort suits—than that very same search or seizure conducted without a warrant.

With this background in mind, let us now turn to a revealing but rather confused passage that appears in a recent review of

³⁶ Tracey Maclin, *When the Cure for the Fourth Amendment is Worse Than the Disease*, 68 S. CAL. L. REV. 1, 12 (1994).

my book on constitutional criminal procedure, a review authored by my old friend Professor George C. Thomas III. He asks why a presumptive warrant requirement couldn't be defended by the Court by saying something like the following:

Look, we don't know what the Framers intended, and we have no idea how to craft from scratch a doctrine of Fourth Amendment reasonableness that will have clarity and bite. But the Framers clearly contemplated a tightly regulated role for warrants, and we will therefore interpret reasonable[ness] to mean a rebuttable presumption that all searches must be accompanied by a warrant. And to help clarify what rebuts that presumption, we will group the searches that do not need warrants into categories. Then we will say that all searches must be accompanied by a warrant except those in a few well-delineated categories.³⁷

Professor Thomas's first clause is not a promising start. If judges don't know what the Framers intended, what follows? I would suggest that, as a first step, perhaps the judges should read the words of the Constitution more carefully and seriously ponder the lessons of history. (Perhaps my book could help here.) It surely does not follow that judges should make up silly rules and impose them on the rest of us as inflexible constitutional mandates that bear little or no resemblance to the document authorized by We the People. Surely Professor Thomas would not endorse the following sentences: "Look, we don't know what the Constitution means, so we'll just do whatever we please. . . . By the way, we hereby decide that the moon is made of green cheese." In short, confessing cluelessness is not a good way for judges to begin telling the rest of society how it must run. Things do not improve much in Professor Thomas's second clause, which also elevates cluelessness into a judicial virtue. If judges truly "have no idea how to begin" crafting a serious doctrine of reasonableness, why should the rest of us pay any attention to them? And the issue is not, of course, constructing such a reasonableness doctrine "from scratch," as Thomas wrongly implies. Rather, judges have all the resources of the legal tradition to build on—constitutional principles expressed elsewhere in the document, the teachings of history and tradi-

³⁷ George C. Thomas III, *Remapping the Criminal Procedure Universe*, 83 VA. L. REV. 1819, 1832 (1997) (reviewing AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997)).

tion, norms evident elsewhere in the legal, moral, social, and political landscape, the dictates of common sense, and so on. In short, it is simply foolish to posit that thoughtful judges could not sensibly fashion a reasonableness framework, building on what I have elsewhere called common sense reasonableness and constitutional reasonableness. Indeed, as I shall show below, the good *Terry* began to outline some of the basic features of that framework. A final point about Professor Thomas's unpromising first sentence: It bears no resemblance whatsoever to what the Justices *actually* said in the main opinions that laid the modern foundation for the warrant requirement. These opinions—the majority opinions in *Trupiano* and *Johnson*, and Justice Frankfurter's dissents in *Harris* and *Davis*, for example—were based on precisely the opposite idea of Thomas's: "We know precisely what the Framers intended, and what they intended was that all searches and seizures be accompanied by warrants, at least wherever practical. That is the obvious, if implicit, textual command of the words of the Fourth Amendment."³⁸ Now, the Justices were plainly wrong about this, I have argued. But the doctrine Professor Thomas seeks to defend is based not on confessions of cluelessness, but rather on confident (albeit erroneous) arguments rooted in text and original intent.

In short, Professor Thomas's entire first sentence is a non-starter. But his second sentence is even worse—for it gets constitutional history and structure (not to mention text) precisely upside down. As we have seen, the Framers contemplated a tightly regulated role for warrants because in important respects searches under warrants were worse and more dangerous than warrantless actions. Using this concern as a basis for a presumptive warrant requirement is like saying the following:

Look, we're really clueless about freedom of the press, but since we know there was concern about prior restraints, we will therefore require these restraints whenever possible. We're also clueless about due process, but since we know there was concern about notice and the opportunity to be heard, we will therefore require *ex parte* proceedings wherever possible. Oh, and bench trials too, since

³⁸ My words here are a paraphrase of the following cases: *Trupiano v. United States*, 334 U.S. 699, 705 (1948); *Johnson v. United States*, 333 U.S. 10, 13-14 (1948); *Harris v. United States*, 331 U.S. 145, 161-62 (1947) (Frankfurter, J., dissenting); *Davis v. United States*, 328 U.S. 582, 595, 602, 605, 609 (1946) (Frankfurter, J., dissenting).

we're clueless about juries, but we know that there was concern about judges.

In the remainder of his confused passage, my friend George Thomas in effect rewrites the Fourth Amendment. Here, at the end, we have something that does, in a sense, follow from the opening clause of this passage, but it is not a pretty picture: "Look, we're clueless . . . so we'll just make stuff up." I think that we can do better than this, and that *Terry* can help us in our efforts. Let us then, return to *Terry*.

B. *Terry* Again

Recall that the good *Terry* insisted on reasonableness as the "central inquiry under the Fourth Amendment."³⁹ But the bad *Terry* tended to undercut this: "We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances."⁴⁰ Why, then was Officer McFadden's warrantless intrusion permissible? Apparently because of "exigent"—that is, urgent—circumstances. Officer McFadden simply did not have time to get to a judge and ask for a warrant. Stops and frisks, said the Court, involved "necessarily *swift* action predicated upon the on-the-spot observations"⁴¹ of officers on the beat. These swiftly unfolding situations, said the Court, could not "as a practical matter"⁴² be subjected to the warrant procedure. Real time moves too fast for judges here, *Terry* suggested.

But the obvious problem with this argument—which tries to work within a basically "warrantist" framework—is that it can justify a stop and frisk only if such an intrusion is accompanied by probable cause. For if probable cause exists, then the urgency argument works: If McFadden had only had the time, he could and would have sought a warrant, and a judge could and would have issued a warrant. Since he did not have the time (through no fault of his own—these situations are "necessarily swift"), we will allow him to do what a sensible neutral magistrate would have authorized him to do, via a warrant, had there been enough

³⁹ *Terry*, 392 U.S. at 19.

⁴⁰ *Id.* at 20 (citations omitted).

⁴¹ *Id.* (emphasis added).

⁴² *Id.*

time. But even if McFadden had been blessed with all the time in the world—even if the judge had been standing at McFadden’s side, warrant pad and pen in hand—a judge could not have issued a warrant in the absence of probable cause. The words of the warrant clause, which the *Terry* Court never quoted (and perhaps now we can begin to see an unattractive explanation for this omission), are emphatic and unambiguous on this point: “no Warrants shall issue, but upon *probable cause* . . .”⁴³ (My ellipsis and emphasis, of course.)

This is precisely the point where Justice Douglas, in lonely dissent in *Terry*, started hopping up and down:

I agree that petitioner was “seized” within the meaning of the Fourth Amendment. I also agree that frisking petitioner and his companions for guns was a “search.” But it is a mystery how that “search” and that “seizure” can be constitutional by Fourth Amendment standards, unless there was “probable cause.” . . . The opinion of the Court disclaims the existence of “probable cause.” . . . Had a warrant been sought, a magistrate would, therefore, have been unauthorized to issue one, for he can act only if there is a showing of “probable cause.” We hold today that the police have greater authority to make a “seizure” and conduct a “search” than a judge has to authorize such action To give power to the police to seize a person on some grounds different from or less than “probable cause” would be handing them more authority than could be exercised by a magistrate in issuing a warrant to seize a person.⁴⁴

What is the *Terry* majority’s response to this argument? Silence. This is bad indeed. For there is a compelling response to Douglas that is available—but it tends to call into question (or at least recast) the warrant requirement cases from which the bad *Terry* refused to retreat. The compelling response would go something like this:

It is a “mystery” to our sole dissenting colleague how we today can uphold a “search” and “seizure” in the conceded absence of “probable cause,” but the mystery is easily solved by examining the Fourth Amendment’s text, and by consulting common sense. Textually, “probable cause” is not a global requirement for all searches and

⁴³ U.S. CONST. amend. IV (emphasis added).

⁴⁴ *Terry*, 392 U.S. at 35-36 & n.3 (Douglas, J., dissenting) (footnotes omitted).

seizures, but only a requirement for warrants. As our elliptical quotation should make clear, the global, free-standing command of the Fourth Amendment is not that all searches and seizures be conducted pursuant to warrants, or be accompanied by probable cause, but rather that all searches and seizures be reasonable. Certain intrusions may be reasonable even if lacking in probable cause—for example, where the government need is especially weighty (imagine a 1% chance of finding a bomb, or on the facts of the case at hand, recall the need to assure the personal safety of Officer McFadden), or the search is minimally intrusive and nondiscriminatory (imagine metal detectors in the airports of the future). There is a long and unbroken history of various reasonable searches lacking probable cause—border searches, inspections of regulated businesses, periodic building code inspections of homes and apartments, public school regimens, and countless more. If we wrongly insist that all searches and seizures must be accompanied by probable cause, there are only four possible outcomes, and none is constitutionally attractive. First, we will stick to this strict rule, and render much of the world—the reasonable world, the necessary world—unconstitutional. This would be madness. Second, we will proliferate ad hoc exceptions rather than admitting that we have simply misframed the initial rule. This would be unprincipled. Third, we will dishonestly label some searches “non-searches.” This would be precisely the “all-or-nothing” “torture[d]” word-game that we emphatically reject today. Fourth, we will water down the concept of “probable cause,” saying that in some cases mere individualized suspicion, or even a complete absence of suspicion, can count as “probable” enough (wink). But once we have done that, we will necessarily be authorizing *warrants* to issue on this winking, watered-down concept. If that happens, we will have betrayed the central textual command of the second clause of the Fourth Amendment: We would be allowing *warrants* on something less than true probable cause. In other words, we would be authorizing *general warrants*—precisely the evil the Framers meant to reject in the second clause.

These last points require more elaboration, and prompt us to explain the seeming anomaly that so troubles our dissenting colleague. *Various searches may properly take place even though they could not properly be authorized by*

a warrant. Because warrants at the founding issued *ex parte*, and pre-empted the possibility of various after-the-fact opportunities for judicial review of the search, warrants were carefully hedged by certain limitations that did not apply to warrantless action. By analogy, temporary restraining orders (TROs), because they issue *ex parte*, are hedged by certain limitations that do not apply outside the TRO context. Warrants at the founding could issue only for inherently suspicious items like stolen goods, and contraband. Of course this did not mean that “mere evidence” could not be “seized” but only that a *warrant* could not issue for innocent “mere evidence” in the hands of a person not suspected of personal wrongdoing. A subpoena *duces tecum* may issue for such “mere evidence,” and it would be sheer torture of the English language to suggest that such a subpoena is not a “seizure” of sorts. Moreover, a subpoena may often issue in the absence of “probable cause”—consider a grand jury’s typical subpoenas, which issue precisely to determine whether there exists “probable cause” to believe that a crime has occurred. Of course, a subpoena is far less intrusive than a surprise search and seizure pursuant to a warrant—which is one of the reasons it may issue on a less stringent showing. But it is yet another example of a reasonable “search” or “seizure” in the absence of probable cause.

To put the point yet another way, the warrant clause dealt only with searches for stolen goods, contraband and the like, and with full-blown arrests. Where only property interests in recovering goods was at stake, and where highly intrusive full-blown arrests were involved, “probable cause” struck a sensible—a *reasonable*—balance of interests. But where human life is at risk—Officer McFadden’s life in today’s case—and where the intrusion on the citizen falls well short of a full-blown arrest, it would be silly to insist that the balance struck in the arrest and stolen goods context is the only reasonable balance for the very different kind of search and seizure at hand today. To wrench the words “probable cause” out of their proper context—governing warrants—and to press them into service as the global requirement of all searches and seizures is to flout text, ignore history, and defy common sense.

In light of what we have said, it should now be clear

that in a wide range of cases, searches and seizures will and may take place even though a warrant could never issue (because probable cause is absent). *This is still another way of proving that there could never be a truly global warrant requirement for all searches and seizures.* To the extent that our earlier cases set forth a global warrant requirement (and thus a global probable cause requirement) as an implication of the text of the Fourth Amendment, or as dictated (or even supported) by its original intent, we now confess error. But we need not retreat from the basic holdings of many of these cases, on their facts. Police departments raise special concerns that justify special judicial supervision and scrutiny. In a wide variety of situations, a regime of ex ante judicial oversight can help prevent police overzealousness, and thereby make citizens more secure in their persons, houses, papers, and effects. If we are speaking precisely, we need not and should not call this judicial oversight regime a "warrant requirement;" indeed it would be better for civil liberty if this ex ante oversight occurred in addition to, rather than instead of, the possibility of after-the-fact review. (As revised, the regime would involve pre-clearance, but not preclusion.) But in any event, the category of police conduct that we address today does not lend itself to such ex ante review, given the necessarily swift actions involved. And in the case at hand, there are other aspects of the interaction, that make it reasonable, constitutionally speaking.

And what are those features, you ask? Here, the good *Terry* was not quite so mute, as I shall now try to elaborate.

III. WHAT SHOULD "REASONABLENESS" MEAN?

Reasonableness is a spacious concept. Of course, this is one of its virtues. Precisely because the Fourth Amendment tries to regulate such a vast and protean set of governmental action—(broadly defined) "searches" and "seizures" coming in many sizes and shapes, with different purposes and risks, administered by a wide variety of different government agents and agencies, over decades and even centuries—the Amendment is properly cast in general, spacious language. Elsewhere, I have tried to lay out a framework for taking Fourth Amendment reasonableness seriously, a framework based on what I have called "common sense reasonableness" and "constitutional reasonableness." Once

again, it is not my aim today to rehash all of what I have said elsewhere; for present purposes, a few basic points should suffice.

Because of the judicially-created exclusionary rule (about which I shall say a few words later), most lawyers, scholars, and judges today assimilate the Fourth Amendment into the domain of criminal procedure. But this is largely a mistake. For unlike, say, most of the Fifth Amendment and all of the Sixth, which explicitly regulate criminal matters, the Fourth Amendment speaks to all government action. Searches and seizures to enforce civil laws are no less covered than searches and seizures to enforce criminal laws. And on the remedy side, the exclusion of criminal evidence was neither provided for by the Amendment, nor contemplated by any of its Framers or early interpreters. How then was the right against unreasonable searches and seizures and overbroad warrants to be enforced? As we have already noted, by civil trespass suits brought by citizens whose "persons, houses, papers, and effects"⁴⁵ were unconstitutionally invaded. The tort law model is not only evident from history, but also deducible from a close reading of text: It is, after all, tort law that generally secures persons against invasions of their persons, houses, papers, and effects. So rather than conceptualizing the Amendment as constitutional criminal procedure, it is more precise, and helpful, to see it as constitutional tort law.

To some extent, then, tort law concepts of reasonableness may help give meaning to Fourth Amendment reasonableness. However, the Amendment is not mere tort law but *constitutional* tort law. The ordinary tort law rules applicable to private persons may not always sensibly apply when we deal with government officials who are both entitled to do things that private persons generally may not (levy taxes, for example) and barred from doing things private persons may sometimes do (practice race discrimination, for example). When we recall that it is *a* Constitution that we are expounding—a single document designed to cohere, rather than a grab bag of random clauses jumbled together—we see the obvious need to construe the broad reasonableness language of the Fourth Amendment in light of rules and principles affirmed elsewhere in the document. In this model of constitutional reasonableness, Fourth Amendment doctrine must be crafted to safeguard basic constitutional values

⁴⁵ U.S. CONST. amend. IV.

such as free expression, privacy, property, due process, equality, democratic participation, and the like. Common sense understandings of reasonableness must also play a role, both because such understandings help inform tort law generally, and because such understandings should be part of the interpretation of a Constitution that speaks in the name of ordinary people. Many sensible aspects of a proper Fourth Amendment framework of reasonableness—the proportionality principle, and the need to constrain police officer discretion, to take just two examples at random—have deep roots both in technical constitutional doctrine outside the Fourth Amendment and in more general common sense.

What does *Terry* have to say about reasonableness? Quite a lot, if we read with care. Although the *Terry* Court was not particularly systematic or comprehensive, it did—in good common law fashion responding to the facts at hand—identify some of the most important elements of Fourth Amendment reasonableness.

Let us begin by considering what I shall call the proportionality principle: More serious intrusions require more weighty justifications. In the Court's words:

[T]he scope of the particular intrusion, in light of all the exigencies of the case, [is] a central element in the analysis of reasonableness. Focusing the inquiry squarely on the dangers and demands of the particular situation also seems more likely to produce rules which are intelligible to the police and the public alike

. . . [A] search which is reasonable in its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. The scope of the search must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible⁴⁶ [T]here is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails."⁴⁷

A few quick points about the Court's insights here. First, the Court focused on both the depth and the breadth of an intrusion—on its "intensity" and "scope." On intensity, for example, the Court quoted the following "apt description" of the frisk:

⁴⁶ *Terry*, 392 U.S. at 17-19 & n.15 (citations omitted).

⁴⁷ *Id.* at 21 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967)) (second and third alterations from original).

“ [T]he officer must feel with sensitive fingers every portion of the prisoner’s body. A thorough search must be made of the prisoner’s arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.’ ”⁴⁸ Nevertheless, said the Court, the intensity of a typical frisk was less than that of a typical search incident to arrest, since the latter can “involve a relatively extensive exploration of the person”⁴⁹ for things other than weapons—evidence, fruits, and so on. On scope, the Court stressed that the typical frisk is a far more “brief . . . intrusion upon the sanctity of the person”⁵⁰ than a typical arrest.

Second, and related, the Court used reasonableness not just to examine the initiation of the intrusion, but the entirety of the transaction. This common-sense approach has deep roots in constitutional history. In one of the landmark English cases that set the stage for the Fourth Amendment, the 1765 case of *Money v. Leach*,⁵¹ Lord Mansfield acknowledged that the four-day detention of printer Dryden Leach raised questions not only about the existence of “probable cause or ground of suspicion”⁵² to arrest, but also about whether the official “detained the plaintiff an unreasonable time.”⁵³ In a companion case, *Huckle v. Money*,⁵⁴ tried before soon-to-be Lord Camden, the defendants sought to emphasize that though the journeyman printer in that case had been kept in custody for “about six hours” he had been handled “very civilly” and “treat[ed] . . . with beef-steaks and beer.”⁵⁵

Third, the proportionality principle looks not only at the depth and breadth of the entire intrusion, but measures these against the depth and breadth of the legitimate governmental need at hand. The existence of a genuine threat to the personal safety of police officers—a threat not present in many ordinary searches and arrests—very much affected the proper balance to be struck in frisk cases, *Terry* explained:

We are now concerned with more than the governmental

⁴⁸ *Id.* at 17 n.13 (quoting L.L. Priar & T.F. Martin, *Searching and Disarming Criminals*, 45 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 481, 481 (1954)).

⁴⁹ *Id.* at 25.

⁵⁰ *Id.* at 26.

⁵¹ 97 Eng. Rep. 1075 (K.B. 1765).

⁵² *Id.* at 1087.

⁵³ *Id.* (emphasis added). For more discussion of the point, see Amar, *supra* note 20, at 61 n.36.

⁵⁴ 95 Eng. Rep. 768 (C.P. 1763).

⁵⁵ *Id.* at 768.

interest in investigating crime; in addition, there is a more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks [Even] in situations where [he] may lack probable cause for an arrest[,] . . . it would appear to be clearly unreasonable to deny the officer the power to take necessary measures [upon individualized suspicion] to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.⁵⁶

Fourth, although proportionality sometimes allows intrusions on less than probable cause (as in *Terry* itself), at other times proportionality should require more than probable cause. Even though there was probable cause and a warrant in the post-*Terry* case of *Winston v. Lee*,⁵⁷ the proposed surgical removal of the bullet was simply too intrusive, and the marginal evidentiary value of the bullet too slight, to justify the intrusion. And so, under the proportionality principle, the intrusion was unreasonable. Even if the cops have probable cause to believe a citizen has committed a minor traffic offense, should this suffice to justify an intrusive full-blown arrest, as opposed to a less intrusive summons?⁵⁸ Even if a warrant has issued, are there no limits on the manner in which the warrant is to be reasonably executed—in terms of the length of the search, its destructiveness of property, its timing (day or night), and so on? And so we see yet again how silly it would be to see the warrant or probable cause—rather than reasonableness—as the central building block of sensible constitutional regulation. Those who say reasonableness is simply too vague and unworkable cannot be taken seriously, for their logic proves too much: It suggests not simply that warrants and probable cause are always necessary, but also that they are always sufficient. But clearly, the second clause of the Amendment is not sufficient to make citizens secure. We cannot avoid taking reasonableness seriously—and the good *Terry* is a good step in this direction.

Consider next *Terry*'s promising accent on issues of bodily integrity and personal dignity above and beyond privacy and se-

⁵⁶ *Terry v. Ohio*, 392 U.S.1, 23-24 (1968).

⁵⁷ 470 U.S. 753 (1985).

⁵⁸ See *Gustafson v. Florida*, 414 U.S. 260, 267 (1973) (Stewart, J., concurring).

crecy. The Fourth Amendment explicitly protects “persons” against “unreasonable . . . seizures.”⁵⁹ Much Fourth Amendment doctrine sensibly safeguards legitimate interests in privacy and secrecy, but these are not the only Fourth Amendment interests at stake. Humiliating a citizen in a public ritual that lacks a legitimate public justification is quintessentially unreasonable, but the privacy concept may not fully capture the unreasonableness here. The good *Terry* showed keen sensitivity to all this, highlighting the risk of “harassment,” expressing concern about police officers’ efforts to “humiliat[e]” citizens, and noting that frisks were “performed in public.”⁶⁰ If we see the only focus of the Fourth Amendment as the *private* domain—“the homeowner closeted in his study to dispose of his secret affairs”⁶¹—we miss the ways in which the *public* humiliation of “the citizen on the streets of our cities”⁶² is also cause for special concern, which must be weighed in the proportionality balance. This concern about dignity and bodily integrity can of course be teased out of the history of the Amendment—recall the emphasis on civility in the beer and beefsteak affair—and once again highlights the inadequacy of any approach that sees the warrant and probable cause as the central search and seizure concepts. Even if cops have probable cause to believe that a citizen has committed a minor traffic offense, is it always reasonable to publicly arrest and handcuff the citizen—even if the evident purpose is to humiliate and degrade? To the extent that the true government purpose here may be to impose a kind of punishment before any formal adjudication of guilt, the deep spirit of various criminal procedure provisions outside the Fourth Amendment may indeed be relevant to the constitutional reasonableness of such a degrading bodily seizure.

Although critics may contend that the Court should have done even more than it did, the good *Terry* also deserves credit for highlighting issues of race, issues that should be addressed in a comprehensive framework of constitutional reasonableness. Modern Fourth Amendment discourse, overly focused on warrants and probable cause, has had stunningly little to say about the central issue of race; and I suggest it is not coincidental that

⁵⁹ U.S. CONST. amend. IV.

⁶⁰ *Terry*, 392 U.S. at 14, 15 n.11, 17.

⁶¹ *Id.* at 9.

⁶² *Id.*

one of the most direct—if still too quick—discussions of race in all of Fourth Amendment caselaw occurred in *Terry*, where the Justices finally began to focus attention on the Amendment's first clause rather than its second. The Court expressed concern about the "wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain."⁶³ Implicit in this quick comment is attention not merely to the race of those citizens being searched and seized, but also to the race of those doing the searching and seizing—"certain elements of the police community."⁶⁴ We might be inspired to ask, after closely parsing this passage, if the police department in a given case reflects the demographic makeup of the community. If not, does that suggest a special need to be sensitive to the heightened possibility of racial domination in police-citizen encounters (a possibility that admittedly may also exist in same-race encounters)? A still more comprehensive analysis of race might be sensitive to the race of crime victims, as my friend Professor Randall Kennedy has so powerfully noted in his great book, *Race, Crime, and the Law*. Though the facts of *Terry* did not directly implicate the possibility of gender oppression involved where, say, male police officers harass women through unjustified frisking, perhaps we can hear this note, if we listen carefully to Chief Justice Warren's phrasing in the following passage: "And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his *or her* body in an attempt to find weapons is not a 'search.'"⁶⁵

Attention to issues of race and sex and possible discrimination yields a surprising thought: Sometimes equality values may counsel a broader search or seizure, and perhaps this broader search—though more threatening to privacy values—may be more constitutionally reasonable because less susceptible to discrimination and discretion. If we obsess on the warrant clause, we are likely to see the more narrow, more individualized search as always constitutionally preferable: The clause, after all, deals with an individualized adjudication of "probable cause" directed at "particularly describ[ed]"⁶⁶ persons and places. But as the air-

⁶³ *Id.* at 14.

⁶⁴ *Id.*

⁶⁵ *Id.* at 16 (emphasis added).

⁶⁶ U.S. CONST. amend. IV.

port metal detector illustrates, perhaps some searches may be more constitutionally reasonable precisely when no singling out or particularization occurs—when all must be searched, black and white, male and female, rich and poor, rather than when individual suspects are picked out by cops. This safety-in-numbers argument has appeared quite prominently in post-*Terry* cases like *Sitz*⁶⁷ and *Vernonia*,⁶⁸ but perhaps we can see a very early prototype of the argument in *Terry* itself, in its evident concern with racial equality issues and its explicit distrust of any model that would leave things utterly in the subjective “discretion of the police.”

Finally, let us note an intriguing suggestion in *Terry* about whose judgments about reasonableness should count. According to the Court, “the degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security caused by those practices.”⁶⁹ Elsewhere, I have suggested that Fourth Amendment reasonableness doctrine should not be utterly oblivious to the common sense of common people. The Constitution is a democratic document that speaks in the name of the people, the Fourth Amendment itself explicitly invokes “the people,” and “reasonableness” is not always a highly technical legal concept where only judges and lawyers have wisdom. At the Founding, civil juries often played a role in helping to define the idea of Fourth Amendment reasonableness. (Contrary to the claims of some of my critics, I do not believe—and have never said—that juries historically played, or today should play, the sole role in giving meaning to reasonableness.) There are of course many ways of trying to keep reasonableness doctrine in some sync with democratic understandings—citizen review boards, citizen ombudsmen, better use of empirical survey data, and countless others. Surely we should not put all Fourth Amendment issues up to majority vote—especially where issues of racial equality are at issue. But the views of what *Terry* referred to as “the community” are not altogether irrelevant to reasonableness analysis, even as they are not necessarily dispositive.

To illustrate with a perhaps controversial and admittedly

⁶⁷ *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990).

⁶⁸ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

⁶⁹ *Terry*, 392 U.S. at 17 n.14.

oversimplified example: If, say, the great majority of the residents of a given public housing project want metal detectors in the lobby, and continue to want them even after they have seen them in operation, I suggest that this fact should not be ignored in a proper reasonableness analysis conducted by judges. As both the subjects of the search and its intended beneficiaries (as well as its authors or authorizers, if the system is implemented at their suggestion), the residents of the project are in a good position to consider its reasonableness, and to assess whether it ultimately makes them feel more or less secure in their persons, houses, papers, and effects. The views of these members of the community are worthy of respect; these views should be part of the conversation though they need not be the last word. As *Terry* nicely put the point, "the degree of community resentment aroused by particular practices is clearly relevant" ⁷⁰

IV. MUST ALL UNREASONABLY OBTAINED EVIDENCE BE EXCLUDED?

Having canvassed all the major issues of Fourth Amendment rights—what is the Amendment's threshold, what is its central mandate, and what are some of the components of that mandate?—it remains to consider the question of Fourth Amendment remedies. Here we can very clearly see two *Terrys* at work.

One *Terry*—the bad one, in my view—affirmed various trite tropes about the constitutional imperative of exclusion. Thus the Court told us that:

[E]xperience has taught that [the exclusionary rule] is the only effective deterrent to police misconduct in the criminal context, and that without it the constitutional guarantee against unreasonable searches and seizures would be a mere "form of words." The rule also serves another vital function—"the imperative of judicial integrity." Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. . . .

. . . When such [unconstitutional] conduct is identified, it must be condemned by the judiciary and its fruits must

⁷⁰ *Id.*

be excluded from evidence in criminal trials.⁷¹

Elsewhere, I have expressed my constitutional objections to this way of thinking, and once again, I shall merely summarize today. The “judicial integrity” argument begs the question and proves too much. The exclusionary rule has never applied in ordinary civil cases, where the government is free to use reliable evidence even if such evidence is the fruit of an illegal search. This long-standing judicial practice does not offend judicial integrity, rightly understood, because courts that adjudicate cases based on reliable evidence do not thereby become “party” to any antecedent illegality. They *affirm* their distinctive judicial integrity as seekers of truth when they permit truthful evidence to be introduced in their courts. And the same logic applies to criminal cases—which is why no court in America ever excluded evidence on Fourth Amendment-like grounds for the first century after Independence. (Of course, the integrity argument is also disproved by the many exceptions to exclusion in criminal cases themselves, today—good faith, impeachment, standing, and so on.)

Connected to the integrity idea is the claim that government should never profit from its own wrong, and thus must not be allowed to use any ill-gotten “fruits.” Like its integrity sibling, this argument cannot account for the practice of civil cases, where exclusion has never applied, or the many exceptions to the rule in criminal cases. But beyond these lawyerly objections lies a much deeper moral objection: Wrongdoers are simply not morally entitled to be restored to the status quo ante which is itself the product of their own wrongdoing. When government finds stolen goods in an illegal search it does not—and should not—give the goods back to the thief. The goods should be restored to their rightful owner, not the thief. When government finds illegal drugs or other contraband, it never gives these back, nor should it. When, in an improper search, cops stumble onto a kidnapping in progress, it would be madness for the cops to restore the kidnapping victim to her captors, close their eyes, count to twenty, and then try again. And the same holds true, legally and morally, of the use of reliable evidence in the courtroom. The law is entitled to this evidence secreted away by the wrongdoer, just as the owner is entitled to the restoration of the goods stolen by the thief, and the kidnapping victim is entitled to the

⁷¹ *Id.* at 12-13, 15 (citations omitted).

restoration of her liberty wrongly denied by her captors. I stress this point today precisely because it seems to have escaped some of my critics. For example, my otherwise thoughtful friend George Thomas seems to have utterly missed this point—made repeatedly in my book⁷²—in his recent defense of the exclusionary rule as restitutionary justice.

Consider next the bad *Terry*'s claim that without the exclusionary rule the Fourth Amendment would be reduced to a mere "form of words."⁷³ This trope has a nice ring to it, but analytically self-destructs. By referring to "words" the trope unwittingly reminds us that the "words" of the Amendment most emphatically do not require exclusion, and that no one at the Founding—or for the next hundred years, for that matter—ever thought they did. Did all these dolts simply not know how to use words? Were they all simply charmed by the sounds of the syllables, but unconcerned about whether these words were made real in the world? Of course not. They believed the Amendment was not a *mere* form of words, but that the words *did* matter. It mattered, for example, that the words do not demand warrants or probable cause or exclusion. And as for making these words real in the world, that was the task of civil tort law, not criminal exclusion law.

And so we come at last to deterrence, the "major thrust" of the exclusionary rule according to *Terry*. If it really were true that exclusion was the only—or even the best—deterrent scheme, then perhaps some of the bad *Terry*'s other rhetorical excesses and missteps might be forgiven. But even if we assume that exclusion deters better than the Founders' scheme, there would still be huge issues of judicial competence to foist exclusion on the rest of us. A "Leavenworth lottery" in which whenever the government illegally searches person X, judges spin the lottery wheel and spring some lucky (but unrelated) convict Y from Leavenworth, might deter like gangbusters, but I doubt judges have authority to craft a "remedy" with such a loose analytic nexus to the scope of the violation. In any event, I do not think that "experience has taught" that exclusion is "the only effective deterrent."⁷⁴ Empirically, the Founding experience and the experience of other countries, like England and (until re-

⁷² See, e.g., CRIMINAL PROCEDURE, *supra* note 25, at 27, 154-55, 194 n.140.

⁷³ *Terry*, 392 U.S. at 12 (quoting *Mapp v. Ohio*, 367 U.S. 643, 655 (1961)).

⁷⁴ *Id.*

cently) Canada tend to prove otherwise. In 1961, when *Mapp*⁷⁵ was decided, it may have seemed that only exclusion would work, but *Mapp* was reacting to a world without a strong civil remedy system of damages, injunctions, class actions, administrative schemes and the like. At almost the same moment the Court decided *Mapp*, it also breathed life back into § 1983,⁷⁶ which had lain moribund for many decades. Had the Court not decided *Mapp* until after a robust § 1983 model had been given a chance to prove itself, the empirical, analytical, institutional, and political superiority of that model would have been more evident. Such a model, as I have explained elsewhere, would have used all the resources of traditional civil remedies and administrative law—injunctions, class actions, attorneys' fees, punitive damages, entity liability, administrative regimes, and more—instead of the less traditional and more morally offensive model of springing the guilty to somehow make the rest of us more secure.

By 1969, some of the cracks in *Mapp*'s model were beginning to show, and the good *Terry* fessed up to some of this:

[T]he issue [in today's case] is not the abstract propriety of the police conduct, but the admissibility against petitioner of the evidence uncovered by the search and seizure

The exclusionary rule has its limitations, however, as a tool of judicial control. . . . [I]n some contexts the rule is ineffective as a deterrent. . . . Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.

Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations. The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be

⁷⁵ *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁷⁶ 42 U.S.C. § 1983 (1994).

stopped by the exclusion of any evidence from any criminal trial. Yet a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime. . . . [We] in no way discourage the employment of other remedies than the exclusionary rule to curtail abuses for which that sanction may prove inappropriate.⁷⁷

This is quite a lot to take in, and here I shall offer only a few quick points. Note how the above-quoted passage begins to drive an analytic wedge between right and remedy: The first sentence sharply distinguishes between the two and later sentences make clear that the rule simply cannot apply to many Fourth Amendment violations. But if the remedy is not broad enough to deal with some Fourth Amendment rights, we might begin to wonder whether it is too broad to deal with other Fourth Amendment rights. We might begin to wonder, in other words, about the analytic fit—or lack thereof—between right and alleged “remedy.” And when we look closely, we see that there is no *analytic* fit—none whatsoever. The analytic violation is the impermissible search or seizure, not the later use of evidence. When the cops wrongly search a house and find stolen goods, the Fourth Amendment wrong is the *search*—regardless of what it finds. Returning the stolen goods is not a proper analytic remedy, and the same holds true for exclusion. (A § 1983-based civil remedy is analytically proper for it is precisely tailored to the scope of the violation—the unreasonableness of the search itself, rather than the contingent fact of finding evidence.) And once we see all this, it would be strange indeed to think that exclusion would empirically be the best deterrent, since it is not *tailored* to the legal scope of the violation. Its deterrent bite does not turn on, say, how unreasonable the search really was (the genuine Fourth Amendment right at stake) but on the happenstances of whether evidence was found, how much, against whom, and so on.

Consider, for example, cases where cops wrongly bop citizens on the nose, or humiliate them without cause. These are unreasonable seizures—and we have seen that the good *Terry* emphasized important Fourth Amendment values of bodily integrity

⁷⁷ *Terry*, 392 U.S. at 12-15 (footnote omitted).

and individual dignity above and beyond privacy and secrecy keeping. But whether the cops bopped someone on the nose is usually wholly unrelated—analytically and even causally—to whether the cops found any evidence. Exclusion will not work well in brutality cases, the good *Terry* confessed. We need to think about other remedies, the good *Terry* admitted. But once we do think about other remedies—like § 1983 suits and the like for folks like Webster Bivens (a black man unreasonably searched, and humiliated, in an episode that uncovered no criminal evidence)⁷⁸—we begin to see how these other remedies are more precisely tailored to the scope of Fourth Amendment rights. And we can then ask why such more precise remedies might not be better than exclusion across the board. In terms of deterrence we can have *more* than under the exclusionary rule in brutality cases. In terms of compensation and restitution, we can restore to innocent folks like Webster Bivens the respect that is due them, and some reparations, too. And in terms of distribution, we can avoid giving windfalls to criminals and imposing taxes on victims of crime, who suffer tremendously when they see the criminals who preyed on them walk free out of the court room, grinning, under the exclusionary rule.

To the extent that the good *Terry* begins to help us see these things, it of course undermines precisely what the bad *Terry* said about the necessity and propriety of the exclusionary rule. And so upon close examination here we see yet again two *Terrys* at work. Three decades after *Terry*, and two centuries after the Founding, it is time—no, it is past time—to choose. In light of what I have said, here and elsewhere, I hope it is clear which *Terry* I would choose, and why.

⁷⁸ See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

